

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**MIRTA F. ABREU, Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, Miami, FL,  
Employer**

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**Docket No. 05-1518  
Issued: October 19, 2005**

*Appearances:*  
*Mirta F. Abreu, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 12, 2005 appellant filed a timely appeal of a February 23, 2005 merit decision of the Office of Workers' Compensation Programs, in which an Office hearing representative affirmed the denial of her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

**FACTUAL HISTORY**

On December 22, 2003 appellant, a 39-year-old mail handler, filed an occupational disease claim alleging that on December 11, 2003 she first realized her stress and depression were employment related. She attributed her condition to being singled out, threatened, losing

her job, harassment and disciplinary actions. Appellant stopped work on December 11, 2003 and has not returned to work.

On January 9, 2004 the Office received a December 24, 2003 statement by Joe Florio, supervisor, regarding appellant's submission of a leave form. She requested 80 hours of leave under the Family and Medical Leave Act for the period December 11 to 26, 2003. Mr. Florio stated that appellant's "work history is such that her current amount of cumulative work hours does not satisfy the amount necessary to entitle an employee to family medical leave protection." He stated that she had difficulty maintaining acceptable work habits and that she had been issued formal discipline to encourage her to conform to acceptable standards of conduct.

On January 26, 2004 the Office received an investigative memorandum from the employing establishment, which included an April 10, 2003 letter of warning to appellant for loitering and leaving her work area without authorization; a November 24, 2003 notice of disciplinary action for unsatisfactory performance based on leaving her assigned workstation without authorization; a January 21, 2004 interview with Mr. Florio; and a January 22, 2004 investigative memorandum.

The January 22, 2004 investigative memorandum addressing the April 10, 2003 letter of warning and the November 24, 2003 notice of disciplinary action and appellant's statement that she was "'stressed out' due to an illness in the family." In a witness interview dated January 21, 2004, Mr. Florio noted that he disciplined her on two occasions and that she did not inform him at that time of her stress or depression. He noted that appellant claimed she was "stressed out" only after receiving discipline.

On January 27, 2004 the Office received a February 9, 2004 disability note by Dr. Alejandro F. Navarro, an attending physician, which diagnosed anxiety and severe depression.

On March 3, 2005 the Office received additional evidence from appellant, including letters to Estimada Millie and Congressman Diaz Balart; employing establishment duty status reports dated September 12 and December 8, 2003 from Dr. Navarro, a treating physician; a February 9, 2004 disability slip by Dr. Navarro; psychotherapy reports dated January 7 and 26 and February 5, 2004 from Maria Elena Lopez; a December 10, 2003 certification of health care provider by Dr. Navarro; and a November 19, 2003 disability slip Dr. Ramon E. Rodriguez-Torres, appellant's mother's physician along with a statement regarding the need to take her mother to get iron shots. In June 17, 2003 information for precomplaint counseling with the employing establishment, appellant alleged discrimination based upon sex, ethnicity and physical disability. Other documents include a 7-day suspension letter for unsatisfactory performance dated November 24, 2003; a December 18, 2003 notice to report for a December 21, 2003 investigative interview; an April 24, 2003 letter informing appellant that she would not be permitted to work limited duty effective April 26, 2003, as her claim had been denied; an April 10, 2003 letter of warning for loitering and leaving assigned work area without authorization; an undated letter regarding the employing establishment's mediation program; and a January 20, 2004 note from appellant that she submitted a Form CA-17 and family medical leave request to Mr. Florio. In the letter to Congressman Balart, she alleged that she was subjected to harassment, intimidation and threats by Mr. Florio. She alleged that he was

constantly watching her and paged her when she went to the restroom.” Appellant also alleged that Mr. Florio instructed her that he had “to wait till my break to go to the restroom” and stated that since she “already have a letter of warnings this is a 7 day, next a 14 day, then you are out the door.” Appellant stated that she was fearful of losing her job. (Emphasis in original.)

In an undated statement received on March 3, 2004, appellant alleged that she never received any letters of warning for loitering prior to working for Mr. Florio. She also alleges that other employees were allowed to go on breaks at different times and go to the restroom without being watched. Appellant alleged that Mr. Florio would page her and interrogate her upon her return regarding where she went and the time she was gone. She contended that Mr. Florio discriminated against her by constantly watching her. With regard to her revised schedule requests, appellant contended that Mr. Florio denied three different requests but granted revised schedules to other employees in her work area. (Emphasis in original.)

In a separate statement, also received on March 3, 2004, appellant alleged that on January 16, 2003 she was given the “15 days required” regarding her documentation for her incapacitation for the period December 25, 2002 to January 16, 2003. She stated that Mr. Florio gave her a 14-day suspension for being absent without leave when she returned to work. On April 25, 2003 appellant received a certified letter regarding the fact that she would be subject to disciplinary action if she did not provide documentation for her absence.” She alleged that on December 4, 2003 she was given a verbal warning.

In a December 11, 2003 CA-17 form, Dr. Navarro diagnosed anxiety and severe depression with back pain as another disabling condition. He indicated that appellant was unable to resume work.

In the December 20, 2003 certification of health care, provided under the Family and Medical Leave Act, Dr. Navarro diagnosed stress and severe depression which appellant “states is work related.” He indicated that she would be off from December 11 to 26, 2003 and possibly to January 4, 2004, depending on her need to see a psychologist.

Appellant submitted a copy of her request for a revised schedule due to her mother’s illness. She noted “for the third time it was denied when five other coworkers have revised schedules.”

In a February 9, 2004 disability note, Dr. Navarro diagnosed severe depression and anxiety and work as the problem. He concluded that appellant was totally disabled from December 11, 2003 to the present.

By decision dated May 17, 2004, the Office denied appellant’s claim on the grounds that she failed to establish that she sustained an injury in the performance of duty. It found that she failed to establish any compensable factors of employment.

Appellant requested an oral hearing which was held on November 30, 2004. She submitted a statement regarding the November 10, 2003 incident and a copy of her Equal Employment Opportunity (EEO) complaint against Abe Casteleiro, a supervisor.

By decision dated February 23, 2005, the Office hearing representative affirmed the May 17, 2004 decision.

### **LEGAL PRECEDENT**

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.<sup>1</sup> To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.<sup>2</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*<sup>3</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.<sup>4</sup> There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under the Act. When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.<sup>5</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.<sup>6</sup> This includes matters involving the training or discipline of employees.<sup>7</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>8</sup> In determining whether the

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<sup>1</sup> *Edward C. Heinz*, 51 ECAB 652 (2000); *Martha L. Street*, 48 ECAB 641, 644 (1997).

<sup>2</sup> *Phillip L. Barnes*, 55 ECAB \_\_\_\_ (Docket No. 02-1441, issued March 31, 2004); *Judy L. Kahn*, 53 ECAB 321 (2002); *Ray E. Shotwell, Jr.*, 51 ECAB 656 (2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>3</sup> 28 ECAB 125 (1976).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> See *Anthony A. Zarcone*, 44 ECAB 751 (1993).

<sup>6</sup> See *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004); *Gregory N. Waite*, 46 ECAB 662 (1995); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991)

<sup>7</sup> *Charles D. Edwards*, *supra* note 6.

<sup>8</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>9</sup>

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>10</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.<sup>11</sup> Grievances and EEO complaints by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>12</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed actors of employment and may not be considered.<sup>13</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>14</sup>

### ANALYSIS

In the present case, appellant alleged that she sustained an emotional condition as a result of harassment and threats by Mr. Florio, her supervisor. By decision dated May 17, 2004, the Office denied her emotional condition claim on the grounds that she had not established any compensable employment factors. By decision dated February 23, 2005, the Office hearing representative affirmed the Office's May 17, 2004 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's

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<sup>9</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> *James E. Norris*, 52 ECAB 93 (2000).

<sup>12</sup> *Id.*

<sup>13</sup> See *Phillip L. Barnes*, 55 ECAB \_\_\_\_ (Docket No. 02-1441, issued March 31, 2004); *Norma L. Blank*, 43 ECAB 384 (1992).

<sup>14</sup> *Lori A. Facey*, 55 ECAB \_\_\_\_ (Docket No. 03-2015, issued January 6, 2004)

performance of her regular duties, these could constitute employment factors.<sup>15</sup> However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>16</sup> In the present case, appellant's supervisor denied that she was subjected to harassment or discrimination and she has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisor.<sup>17</sup> She provided no corroborating evidence, such as witness statements, to support her claim that Mr. Florio singled her out for disciplinary action or discriminated against her.<sup>18</sup> The only evidence in the record is appellant's statements contending that Mr. Florio harassed her, by monitoring her restroom visits and questioning her upon her return as to her whereabouts or discriminated against her and a June 17, 2003 information for precomplaint counseling report filed by appellant in which she alleged discrimination based upon sex, ethnicity and physical disability. There is no final decision regarding this complaint in the record. Thus, appellant has not established a compensable employment factor under the Act with respect to these above-described allegations of harassment and discrimination.

Regarding appellant's allegations that her supervisor engaged in improper disciplinary actions; wrongly denied her request for a revised schedule three times; improperly demanded medical documentation for sick leave; and unreasonably monitored her work activities, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employees regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>19</sup> Although the handling of disciplinary actions and leave requests, the assignment of work duties and the monitoring of work activities are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>20</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>21</sup> However, appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters. Thus, she has not established a compensable employment factor under the Act with respect to administrative matters.

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<sup>15</sup> *Charles E. McAndrews*, 55 ECAB \_\_\_\_ (Docket No. 04-1257, issued September 10, 2004).

<sup>16</sup> *Mary J. Summers*, 55 ECAB \_\_\_\_ (Docket No. 04-704, issued September 29, 2004).

<sup>17</sup> See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>18</sup> See *William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>19</sup> See *Lori A. Facey*, *supra* note 14. See also *Janet I. Jones*, 47 ECAB 345 (1996); *Jimmy Gilbreath*, 44 ECAB 555 (1993); *Apple Gate*, 41 ECAB 581 (1990); *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

<sup>20</sup> *Id.*

<sup>21</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

The record is devoid of any evidence establishing error or abuse. The record relevant to the disciplinary actions includes a January 22, 2004 investigative memorandum regarding appellant's conduct and disciplinary action taken against her; a 7-day suspension letter for unsatisfactory performance dated November 24, 2003; a December 18, 2003 notice to report for a December 21, 2003 investigative interview; an April 24, 2003 letter informing appellant that she would not be permitted to work limited duty effective April 26, 2003, as her claim had been denied; an April 10, 2003 letter of warning for loitering and leaving assigned work area without authorization; and a January 20, 2004 notice to report with a note from appellant that she submitted a CA-17 and family medical leave request to Mr. Florio. There is nothing in the evidence submitted showing that the employing establishment erred or abused its discretion in disciplining appellant. Thus, she has not established a compensable factor of employment with regards to disciplinary actions.

Regarding appellant's allegations that the employing establishment wrongly denied leave request under the Family and Medical Leave Act and her requests for a revised schedule, this, as noted above, is related to administrative or personnel matters and is unrelated to her regular or specially-assigned work duties. Appellant did not submit any evidence supporting her claims that the employing establishment committed error or abuse regarding denial of leave.<sup>22</sup>

Appellant also attributed her emotional condition due to stress from her fear of losing her job following the disciplinary actions taken against her. However, the Board has held that fear of job loss is not compensable.<sup>23</sup>

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.<sup>24</sup>

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

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<sup>22</sup> *John Polito*, 50 ECAB 347 (1999).

<sup>23</sup> *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

<sup>24</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Lori A. Facey*, *supra* note 14; *Margaret S. Krzycki*, 43 ECAB 496 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 23, 2005 is affirmed.

Issued: October 19, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board